

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed. The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered accidental injury to his thoracic and lumbar spine on February 12, 2002, when, while lifting up a heavy object, he felt a pain in his back, approximately three to four inches above his belt. He was taken to the Shawnee Mission Medical Center emergency room and ultimately came under the care of board certified orthopedic surgeon Scott R. Luallin, M.D. He was diagnosed with a thoracolumbar strain of a chronic nature, with radiculopathy. An MRI performed indicated degenerative disc disease at L4-5 and L5-S1, with a mild bulge at L3-4. A prior MRI done after a 1999 injury showed similar results. Claimant also underwent EMGs, which were read as normal, showing no radiculopathy. However, claimant did have complaints of radicular symptoms into his right leg, with occasional symptoms down the left leg. Claimant underwent an FCE and, as a result, was returned to work with restrictions of occasional lifting from 50 to 100 pounds, frequent lifting from 25 to 50 pounds and constant lifting 10 to 20 pounds. As of the regular hearing, claimant was back to work at a comparable wage and is, therefore, limited herein to a functional impairment under K.S.A. 44-510e.

Dr. Luallin, utilizing the *AMA Guides* (4th ed.) DRE, found claimant to have suffered a 5 percent impairment to the body as a whole under DRE Category II. He did acknowledge that claimant had radicular complaints.

Claimant was referred for an examination by his attorney to Edward J. Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic examined claimant on two occasions, the first being April 17, 2002, at which time he found claimant to have a limited range of motion. He diagnosed disc space narrowing at L5-S1, osteophytes at L3-4 and L4-5, and L5 radiculopathy. The second examination occurred on October 3, 2003, at which time Dr. Prostic examined the MRI, noting mild ridging at T7-8, with degenerative disc disease at L4-5 and L5-S1, and a slight bulge at L3-4. It is noted that the report of the more recent MRI did indicate an annular tear at L5-S1, but that was not displayed in the report of the earlier MRI, performed after the 1999 injury. Dr. Luallin testified that an annular tear may or may not cause pain, depending upon the severity of the injury.

Dr. Prostic assessed claimant a 12 percent impairment to the body as a whole based upon the *AMA Guides* (4th ed.). However, Dr. Prostic used the range of motion section rather than the DRE, even though he acknowledged that the *AMA Guides* recommend the use of the DRE if at all possible. Dr. Prostic testified that utilizing Table 75 on page 113 and Tables 81 and 82 on pages 128 and 130 of the *AMA Guides* (4th ed.), claimant was entitled to a 7 percent impairment of the lumbar spine, a 3 percent impairment to the thoracic spine and a 2 percent impairment for each lower extremity for the radicular symptoms. However, he reduced the radiculopathy ratings, ultimately determining that claimant had a 12 percent impairment of the body as a whole. He testified that he could have gone as high as 18 percent impairment to the body as a whole, but elected not to.

When asked why he used the range of motion instead of the DRE, Dr. Prostic stated that the *AMA Guides* state that where there are multiple episodes of injury to the same area of the body, the range of motion section is the preferred method. However, when asked to identify where in the *AMA Guides* this particular instruction occurred, he identified page 388 of the Fifth Edition of the *AMA Guides*, rather than any section of the Fourth Edition, as is required by K.S.A. 44-510e.

Dr. Prostic did acknowledge that if he was forced to use the DRE method, claimant would have a 5 percent impairment to the body as a whole rating.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ However, it is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.² While it is acknowledged that both doctors concluded under the DRE that claimant would be entitled to a 5 percent impairment if that section was used, the Board notes Table 70, page 3/108, of the *AMA Guides* (4th ed.), indicates that if there is radiculopathy, DRE Category III may be utilized. A DRE Category III of the lumbar spine would equate to a 10 percent impairment to the body as a whole. The Board finds that the impairment assessed by the ALJ of 9 percent to the body as a whole takes into consideration the concerns of both Dr. Luallin and Dr. Prostic and also compensates claimant for the radiculopathy symptoms claimant was experiencing as a result of the February 12, 2002 accident. The Board, therefore, affirms the Award of the ALJ, granting claimant

¹ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

a 9 percent impairment to the body as a whole for the injuries suffered on February 12, 2002.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated April 1, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director